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No. 06-1471

In The
Supreme Court of the United States

DENNIS W. GAY, ET AL.,

Petitioners,

v.

SARAH MORGAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION OF DEFENSE RESEARCH INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Defense Research Institute ("DRI") moves for leave to file the accompanying brief in support of the position taken by Petitioners Dennis W. Gay, et al., under Supreme Court Rule 37.2. Counsel for Respondent Sarah Morgan has withheld consent to the filing of this brief.

DRI is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent.

DRI participates as an *amicus curiae* in cases that raise issues of vital concern to its membership. This is such a case. DRI believes that resolution of the important jurisdictional issue this petition presents is necessary because the courts of appeals have fractured when determining the burden of proof that a defendant must meet to establish the amount in controversy for removal based on the federal courts' diversity jurisdiction. The issue presented affects not only class actions removed under the Class Action Fairness Act of 2005 ("CAFA"), but every single case removed on the basis of diversity jurisdiction. The confusion fostered by the divergent and conflicting views of the courts of appeals creates the very impediments to review of cases with national implications by

federal courts that Congress sought to eliminate in CAFA. Because removal is an issue of particular significance to defendants, DRI's members are frequently confronted with the focal issue raised by this petition, and their clients are affected by the lack of a clear rule.

While DRI urges the Court to endorse a preponderance-of-the-evidence standard when evaluating the amount-in-controversy requirement, what is of paramount importance is that the Court recognize the potential unfairness of divergent standards being followed in the various circuits. The Court's adoption of a rule that governs all future federal courts in their review of removal petitions will prevent forum shopping and bring consistency and predictability to removal actions.

DRI's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The Petition Should Be Granted To Resolve The Three-Way Split Of Authority On The Standard For Removal To Federal Court	4
II. The Panel's Decision Misapplies This Court's Decision In *St. Paul Mercury*	10
III. The Court Should Grant The Petition To Prevent Plaintiffs From Unfairly Depriving Defendants Of Access To Federal Fora	15
CONCLUSION	20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Abrego Abrego v. Dow Chem. Co., 443 F.3d 676 (9th Cir. 2006) 6

BEM I, L.L.C. v. Anthropologie, Inc., 301 F.3d 348 (7th Cir. 2002) 14

Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000) 7

De Aguilar v. Boeing Co., 47 F.3d 1404 (5th Cir. 1995) 7, 13, 14

Duncan v. Gegan, 101 U.S. 810 (1880) 18

Gafford v. Gen. Elec. Co., 997 F.2d 150 (6th Cir. 1993) 8

Gilman v. BHC Sec., Inc., 104 F.3d 1418 (2d Cir. 1997) 9

Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70, 415 U.S. 423 (1974) 18

Harley v. Fireman's Fund Ins. Co., 245 F. 471 (W.D. Wash. 1913) 13

Iowa Central Ry. v. Bacon, 236 U.S. 305 (1915) 10, 13

Laughlin v. Kmart Corp., 50 F.3d 871 (10th Cir. 1995) 10

Lowdermilk v. United States Bank N.A., 479 F.3d 994 (9th Cir. 2007) 7, 12, 15

Maine v. Gilman, 11 F. 214 (C.C.D. Me. 1882) 13

TABLE OF AUTHORITIES – Continued

Page

Martin v. Franklin Capital Corp., 251 F.3d 1284 (10th Cir. 2001) 10

McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178 (1936) 9

Meridian Sec. Ins. Co. v. Sadowski, 441 F.3d 536 (7th Cir. 2006) 9

In re Minn. Mut. Life Ins. Co. Sales Practices Litig., 346 F.3d 830 (8th Cir. 2003) 9

Morgan v. Gay, 471 F.3d 469 (3d Cir. 2006) .....*passim*

Munsey v. Testworth Labs., 227 F.2d 902 (6th Cir. 1955) 18

Oshana v. Coca-Cola Co., 472 F.3d 506 (7th Cir. 2006) 9

Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868 (6th Cir. 2000) 8

Samuel-Bassett v. KIA Motors America, Inc., 357 F.3d 392 (3d Cir. 2004) 5, 6

Sanchez v. Monumental Life Insurance Co., 102 F.3d 398 (9th Cir. 1996) 6

Savell v. Southern Ry., 93 F.2d 377 (5th Cir. 1937) 18

In re Second Chance Body Armor, Inc., No. 04-12515 (Bankr. W.D. Mich.) 16

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938) .....*passim*

Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353 (11th Cir. 1996) 7

Woods v. Massachusetts Protective Association, 34 F.2d 501 (E.D. Ky. 1929) 13

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

City of Bridgeton v. Toyobo Co., No. CUM-L-000036-04 (Cumberland Cty. Super. Ct., N.J.) 16

Johnson v. Second Chance Body Armor, Inc., No. 2004-003268 (La. 14th Cir. Ct.) 16

LaBrosse v. Toyobo Co., No. 04-402021-CZ (Wayne Cty. Cir. Ct., Mich.) 16

Lemmings v. Second Chance Body Armor, Inc., No. CJ-2004-62 (Mayes Cty. Dist. Ct., Okla.) 16

Scannell v. Toyobo Co., No. CV 04-9288 GPS (Cal. Super. Ct.) 16

STATUTES

28 U.S.C. § 1332(a) 4, 5, 10, 18, 19

28 U.S.C. § 1332(d) 2, 4, 5, 18

28 U.S.C. § 1441(b) 19

28 U.S.C. § 1453 2

735 Ill. Comp. Stat. 5/2-604 (2007) 13

Ala. R. Civ. P. 54(c) 13

Alaska R. Civ. P. 54(c) 13

Ariz. R. Civ. P. 54(d) 13

Ark. R. Civ. P. 54(c) 13

Cal. R. Civ. P. § 580(a) 13

Colo. R. Civ. P. 54(c) 13

D.C. R. Civ. P. 54(c) 13

Ga. Code Ann. § 9-11-54(c) 13

TABLE OF AUTHORITIES – Continued

Page

Haw. R. Civ. P. 54(c) 13
Idaho R. Civ. P. 54(c) 14
Ind. Tr. R. 54(c) 14
Kan. R. Civ. P. § 60-254(c) 14
Ky. R. Civ. P. CR 54.03(2) 14
La. R. Civ. P. Art. 862 14
Mass. R. Civ. P. 54(c) 14
Me. R. Civ. P. 54(c) 14
Mich. Ct. R. 2.601(A) 14
Minn. R. Civ. P. 54.03 14
Miss. R. Civ. P. 54(c) 14
Mont. R. Civ. P. 54(c) 14
N.D. R. Civ. P. 54(c) 14
N.J. Ct. R. 4:42-6 14
N.M. R. Civ. P. 1-054(C) 14
N.Y. R. Civ. P. § 3017(a) 14
Nev. R. Civ. P. 54(c) 14
Ohio R. Civ. P. 54(c) 14
Okla. R. Civ. P. § 2004(B)(2) 14
R.I. R. Civ. P. 54(c) 14
S. Ct. R. 37.6 1
S.C. R. Civ. P. 54(c) 14
Tenn. R. Civ. P. 54.03 14
Utah R. Civ. P. 54(c)(1) 14

TABLE OF AUTHORITIES – Continued

Page

Vt. R. Civ. P. 54(c) 14

W. Va. R. Civ. P. 54(c) 14

Wash. R. Civ. P. 54(c) 14

Wis. Stat. (Rule) § 806.01(c) 14

Wyo. R. Civ. P. 54(c) 14

OTHER

Senate Report 109-14 16

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT OF THE CASE

The facts relevant to the legal issue presented are as follows:

1. Plaintiff Sarah Morgan filed this putative class action in New Jersey Superior Court in early 2006. Pet. App. at 50a. She asserted various claims under New Jersey law against defendants, the manufacturers of the skin cream StriVectin-SD. *Id.* at 68a-73a.

2. Plaintiff's ad damnum sought treble compensatory damages, disgorgement of profits, attorneys' fees, punitive damages, and injunctive relief. Pet. App. at 73a-74a. Plaintiff plead in her ad damnum that "the sum total of [plaintiffs'] . . . trebled damages, attorneys' fees, punitive damages and costs, on all of plaintiffs [sic] causes of action combined, shall not, in any event, exceed $5,000,000." *Id.* at 73a.

3. Petitioners removed the action under CAFA to the United States District Court for the District of New Jersey.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Pet. App. at 3a-4a. Plaintiff in turn moved for remand, asserting that the $5 million amount in controversy required under 28 U.S.C. § 1332(d) had not been satisfied. The district court granted the motion to remand. *Id.* at 25a.

4. The United States Court of Appeals for the Third Circuit granted petitioners leave to appeal the district court's remand order under 28 U.S.C. § 1453. A panel of the Third Circuit held that defendants bear the burden of proving the amount-in-controversy requirement for removal under CAFA, and that because petitioners did not prove to a legal certainty that Plaintiff sought damages exceeding $5 million, the district court's remand order was appropriate. *Morgan v. Gay*, 471 F.3d 469, 477 (3d Cir. 2006). Rather than join the Fifth, Sixth, Seventh, and Eighth Circuits, which had previously held that a removing defendant must prove the jurisdictional amount in controversy by a preponderance of the evidence, the Third Circuit widened an existing circuit split by imposing the burden on removing defendants to prove the amount in controversy "to a legal certainty." *Id.* at 474. Even though the panel acknowledged that the Plaintiff's position that her proposed class "is at least 10,000" and that her trebled compensatory damages alone exceeded $4 million exclusive of punitive damages, profit disgorgement, and statutory attorneys' fees, it concluded that defendants had not shown that Plaintiff's recovery would exceed $5 million to a legal certainty. *Id.* at 476.

SUMMARY OF ARGUMENT

The Court should grant the petition to resolve a deep and mature circuit split regarding the burden that removing defendants must meet to prove the amount in controversy. The range of standards the lower courts have created promotes the very barriers to federal jurisdiction for class actions involving national issues that Congress intended to eliminate in CAFA. The inconsistent decisions of the lower courts also amply demonstrate the need for this Court's urgent intervention.

This case presents an ideal opportunity for the Court to restore consistency to federal diversity jurisdiction and removal jurisprudence by establishing a single standard for the burden of proof a defendant must satisfy to prove the amount in controversy. Importantly, the Court can address the requirement in the context of CAFA, Congress' first statutory change to diversity jurisdiction since changing the amount-in-controversy requirement in 1996. Unless the Court settles the conflict, similarly situated defendants will be treated differently based solely on the federal circuit in which they are sued.

The panel's interpretation also raises the troubling problem that a plaintiff can deprive federal courts of jurisdiction simply by including an ad-damnum clause for a specific amount less than the jurisdictional amount-in-controversy requirement, even though such clauses are not binding on plaintiffs in most states. In other words, if the panel's rule is allowed to stand, plaintiffs would be able to prevent removal based on diversity jurisdiction merely by pleading an amount in controversy that in no way limits the amount they can actually recover. The petition for certiorari should be granted.

ARGUMENT

A defendant seeking to remove based on diversity bears the burden of demonstrating that the jurisdictional amount in controversy is met. 28 U.S.C. § 1332(a). In 2005, Congress enacted CAFA and amended § 1332 (as well as other sections of Title 28) to lessen the requirements for removal of class actions to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Pet. App. at 31a-32a. Congress included a $5 million jurisdictional amount-in-controversy requirement for removal under CAFA. 28 U.S.C. § 1332(d)(2). Before CAFA was enacted, the federal courts had already diverged regarding the standard a removing defendant must satisfy to show the amount in controversy for removal; since CAFA's enactment, the circuit split has deepened, with the panel below staking out the most extreme position – that a defendant must prove the amount-in-controversy requirement to a legal certainty. The petition should be granted to resolve the conflict among the federal courts as to the appropriate standards for traditional and CAFA removal under 28 U.S.C. § 1332(a) and (d), respectively.

I. The Petition Should Be Granted To Resolve The Three-Way Split Of Authority On The Standard For Removal To Federal Court.

The petition should be granted to resolve the three-way split of authority among the federal circuit courts of appeal on the standard for removal to federal court. The Third Circuit formulated a standard that requires a defendant to prove the amount in controversy to a legal certainty in all circumstances. The Fifth, Sixth, Seventh,

and Eighth Circuits have concluded that a preponderance-of-the-evidence standard is appropriate. The Ninth Circuit has adopted an intermediate position: the court applies a preponderance-of-the-evidence standard unless the plaintiff specifically pleads an ad damnum less than the jurisdictional requirement, in which case the legal-certainty test applies. All of these courts begin their analysis with the Court's decision in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938).

In *St. Paul Mercury*, the Court addressed the standard that federal courts were to apply when a plaintiff files suit in federal court based on diversity jurisdiction, and the defendant moves to dismiss, asserting that the plaintiff does not satisfy the amount-in-controversy requirement. 303 U.S. at 288. The Court held that "the sum claimed by the plaintiff controls if the claim is apparently made in good faith," and explained that "[i]t must appear to a *legal certainty* that the claim is really for less than the jurisdictional amount to justify dismissal." *Id.* at 288-89 (emphasis added).

The Third Circuit inappropriately imposed the *St. Paul Mercury* legal-certainty standard on defendants – the parties promoting federal jurisdiction – in all situations. *Morgan v. Gay*, 471 F.3d 469, 474 (3d Cir. 2006). And although the decision below addresses removal under CAFA, as codified in 28 U.S.C. § 1332(d), the Third Circuit had already adopted the "legal certainty" burden for removing defendants under 28 U.S.C. § 1332(a) in *Samuel-Bassett v. KIA Motors America, Inc.*, 357 F.3d 392, 398 (3d Cir. 2004). In *Samuel-Bassett*, the Third Circuit raised the issue of subject-matter jurisdiction *sua sponte*. The defendant KIA Motors of America had removed the putative product-defect action to the district court based on diversity. The

Third Circuit recognized that the lower district courts had articulated a number of different standards regarding a defendant's burden to prove the amount-in-controversy requirement, including "reasonable probability," "preponderance of the evidence," and "legal certainty." *Id.* at 396. The Third Circuit concluded that dicta in *St. Paul Mercury*, 303 U.S. 283, 289, required the adoption of the legal-certainty standard, *Samuel-Bassett*, 357 F.3d at 397-98, even though the Third Circuit acknowledged that "requiring a defendant to show a legal certainty that the amount in controversy exceeds the statutory minimum may lead to somewhat bizarre situations." *Id.* The Third Circuit's decisions in *Samuel-Bassett* and *Morgan* stake out the most extreme position taken by any circuit court addressing the burden that a removing defendant bears with regard to the amount-in-controversy requirement.

The Ninth Circuit has also adopted the legal-certainty test, albeit only where a plaintiff pleads less than the jurisdictional amount in controversy in the plaintiff's ad damnum. In *Sanchez v. Monumental Life Insurance Co.*, 102 F.3d 398 (9th Cir. 1996), the Ninth Circuit addressed the burden of proof on a removing defendant to prove the amount in controversy, concluding that when the complaint is silent with regard to the amount in controversy, the defendant must prove the amount in controversy by a preponderance of the evidence. 102 F.3d at 404 (citing *Gaus v. Miles, Inc.*, 980 F.2d 564 (9th Cir. 1992) (per curiam)); *see also Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 683 n.8 (9th Cir. 2006) (explaining that the preponderance standard applies only when a plaintiff fails to plead the amount in controversy and reserving the issue of what standard to apply when a plaintiff pleads an amount less than the jurisdictional amount) (per curiam).

Earlier this year, the Ninth Circuit confronted the situation where the plaintiff's ad damnum pleads damages that are less than the jurisdictional amount. *Lowdermilk v. United States Bank N.A.*, 479 F.3d 994, 998-1000 (9th Cir. 2007). Citing the Third Circuit's decision in *Morgan*, the court concluded that a legal-certainty standard applied in such a situation. *Id.* at 999; *cf. Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1356-57 (11th Cir. 1996) (explaining "[w]here a plaintiff has made an unspecified demand for damages," it is inappropriate to impose "the daunting burden of proving, to a legal certainty, that the plaintiff's damages are not less than the amount-in-controversy requirement"), *overruled on other grounds*, *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1072-73 (11th Cir. 2000).

The other circuits that have addressed the issue have all concluded that the preponderance-of-the-evidence standard is appropriate in all circumstances. For example, the Fifth Circuit explicitly rejected the legal-certainty standard where a plaintiff pleads an ad damnum of less than the jurisdictional amount. *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1410-11 (5th Cir. 1995). In *De Aguilar*, the plaintiffs, "in a bold effort to avoid federal court," had specifically alleged that their respective damages did not exceed the jurisdictional amount. *Id.* at 1409-10. The Fifth Circuit recognized that "[t]he majority of states, however, have followed the example of Federal Rule of Civil Procedure 54(c) and do not limit damages awards to the amount specified in the ad damnum clause of the state pleading." *Id.* at 1410. The court concluded that the changes in the state rules undermined any imposition of the legal certainty standard on a removing defendant:

> These new rules have created the potential for abusive manipulation by plaintiffs, who may plead for damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with the knowledge that they may be able to evade federal jurisdiction by virtue of their pleading.

Id. The Fifth Circuit ultimately held "that if a defendant can show that the amount in controversy actually exceeds the jurisdictional amount, the plaintiff must be able to show that, as a matter of law, it is certain that he will not be able to recover more than [the jurisdictional amount]." *Id.* at 1411.

Similarly, the Sixth Circuit places a preponderance-of-the-evidence burden on the removing defendant. *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993). Like the Fifth Circuit, the Sixth Circuit recognized that "state counterparts to Rule 54(c) of the Federal Rules of Civil Procedure, might enable a plaintiff to claim in his or her complaint an amount lower than the federal amount-in-controversy requirement in an attempt to defeat jurisdiction while actually seeking and perhaps obtaining damages far in excess of the federal requirement." *Id.* at 157. The Sixth Circuit adopted the "preponderance of the evidence" test because it "best balances the competing interests of protecting a defendant's right to remove and limiting diversity jurisdiction." *Id.* When confronted with a situation where the plaintiff alleged an amount in controversy below the jurisdictional amount, the Sixth Circuit applied the same preponderance-of-the-evidence standard it adopted in *Gafford*. *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871 (6th Cir. 2000).

The Seventh Circuit has also adopted the preponderance-of-the-evidence standard, explaining that because the removing defendant "is the proponent of jurisdiction, it has the burden of showing by a preponderance of the evidence facts that suggest the amount-in-controversy requirement is met." *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 511 (7th Cir. 2006) (citing *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 543 (7th Cir. 2006)). Like the Fifth Circuit, the Seventh Circuit applies the legal-certainty test only to a plaintiff opposing removal: "Once the defendant in a removal case has established the requisite amount in controversy, the plaintiff can defeat jurisdiction only if 'it appears to a legal certainty that the claim is really for less than the jurisdictional amount.'" *Id.* (quoting *St. Paul Mercury*, 303 U.S. at 289).

In similarly endorsing the preponderance-of-the-evidence standard, the Eighth Circuit held that where a plaintiff "alleges no specific amount of damages" or alleges "an amount under the jurisdictional minimum, the removing party . . . must prove by a preponderance of the evidence that the amount in controversy [exceeds the jurisdictional amount]." *In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 834 (8th Cir. 2003). Like the Fifth and Seventh Circuits, the Eighth Circuit places the "to a legal certainty" burden on the party challenging federal jurisdiction.[2]

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[2] The Second and Tenth Circuits have adopted standards for when the complaint is silent as to the amount in controversy, but have not addressed the standard when the plaintiff pleads an ad damnum below the jurisdictional limit. The Second Circuit requires defendants to prove the amount in controversy "to a reasonable probability," meaning by a preponderance of the evidence. *Gilman v. BHC Sec., Inc.*, 104 F.3d 1418, 1421 (2d Cir. 1997) (quoting *McNutt v. Gen. Motors Acceptance Corp.*,

(Continued on following page)

In sum, the Third Circuit's decision wholly or partially conflicts with every other circuit court that has addressed the burden of proof on a removing defendant in the diversity context. The Court should grant the petition because it provides an ideal vehicle to redress the fractured decisions of the circuit courts of appeals under both 28 U.S.C. § 1332(a) and CAFA, and to provide guidance to those courts that have yet to address the issue.

II. The Panel's Decision Misapplies This Court's Decision In *St. Paul Mercury*.

The panel's decision below misapplies the Court's decision in *St. Paul Mercury* by inverting the Court's analysis in that case and applying it to situations where the pleaded amount does not limit damages. The rules of pleading have changed greatly since the Court's 1938 decision in *St. Paul Mercury*, limiting the usefulness of the *St. Paul Mercury* decision.

The proposition that a plaintiff can bar the door to federal court by specifically pleading damages below the jurisdictional amount first appeared in *Iowa Central Ry. v. Bacon*, 236 U.S. 305, 310 (1915), then reappeared in *St. Paul Mercury*. As discussed above, the proposition appeared in *St. Paul Mercury* only as *dictum*. The question

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298 U.S. 178, 189 (1936)). The Tenth Circuit seems to have adopted a standard between a preponderance of the evidence and a legal certainty. The court has explained "that the requisite amount in controversy 'must be *affirmatively established* on the face of either the petition or the removal notice,'" and that "[t]he italicized language requires at a minimum that the jurisdictional amount be shown by a preponderance of the evidence." *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290 (10th Cir. 2001) (quoting *Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (emphasis added)).

before the Court in *St. Paul Mercury* was whether a plaintiff's post-removal amendment reducing the amount in controversy below the jurisdictional limit could extinguish federal diversity jurisdiction when at the time of removal the complaint demanded more than the jurisdictional amount. *St. Paul Mercy*, 303 U.S. at 284.

Red Cab Company sued St. Paul Mercury Indemnity Company in an Indiana state court. *Id.* St. Paul Mercury removed to federal district court, after which Red Cab filed two amended complaints, the second of which contained an exhibit showing actual damages of $1,380.89 – less than the then-jurisdictional amount of $3,000. *Id.* at 284-85. Red Cab did not move to remand, however, and recovered $1,162.98 in a bench trial in the district court. *Id.* at 285. St. Paul Mercury appealed the decision to the Seventh Circuit, which ruled that Red Cab's actual claim was below the jurisdictional amount of $3,000, and thus the district court had been without jurisdiction. *Id.* On appeal, this Court ruled that for cases originally brought in federal court, the plaintiff's good-faith demand controls jurisdiction:

> The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction.

Id. at 288-89 (footnotes omitted). Accordingly, the Court determined that the party challenging federal jurisdiction in an action initiated in federal court bore the burden of proving to a legal certainty that the amount in controversy does not exist.

The Court then turned to the question of whether a plaintiff could extinguish federal diversity jurisdiction by a post-removal reduction of the amount in controversy. The Court held that "events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached." *Id.* at 293 (footnote omitted). In *dictum*, while discussing the merits of its holding, the Court opined that if a plaintiff "does not desire to try his case in the federal court he may resort to the expedient for suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *Id.* at 294.

The panel below (like the Ninth Circuit in *Lowdermilk*), misapplied the Court's *dictum* to justify inverting the Court's analysis in *St. Paul Mercury* to impose the legal-certainty requirement on the removing defendant, the proponent of federal jurisdiction. *Morgan*, 471 F.3d at 474; *Lowdermilk*, 479 F.3d at 999. The panel stated that because "CAFA does not change the proposition that the plaintiff is the master of her own claim," it is appropriate to impose the legal-certainty test on the defendant to prove the amount in controversy exists. *Morgan*, 471 F.3d at 474.

The panel's inverted *St. Paul Mercury* analysis would have been improper in 1938, but developments in the law since *St. Paul Mercury* have made even more problematic

the panel's reliance on the Court's *dictum* to give credence to a plaintiff's ad damnum as a basis of avoiding federal jurisdiction. As the Fifth Circuit recognized in *De Aguilar*, the Court's *dictum* in *St. Paul Mercury* "was premised on the notion that the plaintiff would not be able to recover more in state court than what was alleged in the state court complaint." *De Aguilar*, 47 F.3d at 1410. This premise was nearly universally held at the time of *St. Paul Mercury*. For example in *St. Paul Mercury*, the Court cited *Woods v. Massachusetts Protective Association*, 34 F.2d 501 (E.D. Ky. 1929) to demonstrate a plaintiff's ability to avoid federal diversity jurisdiction by pleading less than the jurisdictional amount. *St. Paul Mercury*, 303 U.S. at 294. Under the state provision in that case, "if there had been no removal and an answer had been filed, plaintiff would not have been entitled to judgment for more than [the amount pleaded]." *Woods*, 34 F.2d at 504; *see also Iowa C. Ry.*, 236 U.S. at 309 ("[t]he state court had authority to determine the effect of the prayer to the petition and it decided that, under the petition, no more than the amount prayed for could be recovered in the action"); *Harley v. Fireman's Fund Ins. Co.*, 245 F. 471, 476 (W.D. Wash. 1913) (plaintiff cannot recover more than the amount demanded in the initial pleading); *Maine v. Gilman*, 11 F. 214, 215 (C.C.D. Me. 1882) (same).

But state pleading rules have changed greatly since 1938, and most states have now adopted rules that, like Federal Rule of Civil Procedure 54(c), do not limit damages to the amount specified in a plaintiff's ad damnum. *E.g.*, Ala. R. Civ. P. 54(c); Alaska R. Civ. P. 54(c); Ariz. R. Civ. P. 54(d); Ark. R. Civ. P. 54(c); Cal. R. Civ. P. § 580(a); Colo. R. Civ. P. 54(c); D.C. R. Civ. P. 54(c); Ga. Code Ann. § 9-11-54(c); Haw. R. Civ. P. 54(c); 735 Ill. Comp. Stat.

5/2-604 (2007); Idaho R. Civ. P. 54(c); Ind. Tr. R. 54(c); Kan. R. Civ. P. § 60-254(c); Ky. R. Civ. P. CR 54.03(2); La. R. Civ. P. Art. 862; Me. R. Civ. P. 54(c); Mass. R. Civ. P. 54(c); Mich. Ct. R. 2.601(A); Minn. R. Civ. P. 54.03; Mont. R. Civ. P. 54(c); Nev. R. Civ. P. 54(c); N.J. Ct. R. 4:42-6; N.M. R. Civ. P. 1-054(C); N.Y. R. Civ. P. § 3017(a); N.D. R. Civ. P. 54(c); Ohio R. Civ. P. 54(c); Okla. R. Civ. P. § 2004(B)(2); R.I. R. Civ. P. 54(c); S.C. R. Civ. P. 54(c); Tenn. R. Civ. P. 54.03; Utah R. Civ. P. 54(c)(1); Vt. R. Civ. P. 54(c); Wash. R. Civ. P. 54(c); W. Va. R. Civ. P. 54(c); Wisc. Stat. (Rule) § 806.01(c); Wyo. R. Civ. P. 54(c). *But see* Miss. R. Civ. P. 54(c). Accordingly, a plaintiff's ad damnum clause usually has no effect on the actual stakes in the case.[3] *See BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 552 (7th Cir. 2002).

Indeed, even the Third Circuit recognized the illusory effect of the ad damnum, agreeing with the Fifth Circuit that modern rules of pleading "'have created the potential for abusive manipulation by the plaintiffs, who may plead damages below the jurisdictional amount in state court with the knowledge that the claim is actually worth more, but also with knowledge that they may be able to evade federal jurisdiction by virtue of the pleading.'" *Morgan*, 471 F.3d at 477 n.8 (quoting *De Aguilar*, 47 F.3d at 1410). Notwithstanding that acknowledgement, the net effect of the panel's adherence to the *St. Paul Mercury dictum* is that a plaintiff's ad damnum is binding only on the defendant who would otherwise be entitled to remove.

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[3] As the Seventh Circuit has suggested, the only way for a plaintiff to avoid federal diversity jurisdiction is to stipulate before removal that the plaintiff is waiving any damages that exceed the jurisdictional amount. *BEM*, 301 F.3d at 552.

Changes in the law have thus made obsolete the Court's *dictum* that a plaintiff can avoid federal jurisdiction by "resort[ing] to the expedient for suing for less than the jurisdictional amount." *St. Paul Mercury*, 303 U.S. at 294. The panel's decision (and the Ninth Circuit's decision in *Lowdermilk* permits a plaintiff to deprive a defendant of its right to proceed in federal court (or even imposing higher burdens of proof solely because of a plaintiff's ad damnum) creating the very inequities the Court sought to avoid in *St. Paul Mercury*. The present case provides the Court with the opportunity to clarify that its nearly 70-year-old *dictum* applies only in those increasingly rare situations where the pleaded amount limits damages, as was routinely the case in 1938.

III. The Court Should Grant The Petition To Prevent Plaintiffs From Unfairly Depriving Defendants Of Access To Federal Fora.

The Court should also grant the petition to prevent plaintiffs from unfairly depriving defendants of access to federal fora. Although the tripartite conflict among the federal courts of appeals alone warrants this Court's review of the Third Circuit panel decision, the very real potential for procedural gamesmanship, as well as federal forum-shopping, by litigants to avoid federal jurisdiction provides an independent basis for this Court's review. And although this case arises under CAFA, it will affect all cases removed on the basis of diversity where the amount in controversy is at issue.

The effects of the Third Circuit's decision are particularly pernicious to the public policies underlying Congress' enactment of CAFA. Congress adopted CAFA to curb abuse of the class-action device. Pet. App. at 31a-32a. These

abuses included plaintiffs' collusive use of multiple class actions arising from the same operative facts and asserting the same claims on behalf of the same people, proceeding simultaneously in multiple state courts to multiply defendants' costs and, effectively, to blackmail defendants into settling even frivolous claims. S. Rep. 109-14, at *4, *20-21, *reprinted in* U.S.C.C.A.N. 3. Congress also expressed disapproval for many state courts' willingness to "freely issue rulings in class action cases that have nationwide ramifications, sometimes overturning well-established rules and policies of other jurisdictions." *Id.* at *4.

The Second Chance Body Armor, Inc. ("SCBA") litigation exemplifies the abuses that CAFA is intended to prevent. In the SCBA litigation, the same class-action plaintiffs' counsel initiated putative class actions in five states, alleging various state law claims regarding allegedly defective bullet-resistant vests produced by SCBA on behalf of a putative nationwide class of vest purchasers and users. *City of Bridgeton v. Toyobo Co.*, No. CUM-L-000036-04 (Cumberland Cty. Super. Ct., N.J.); *Johnson v. Second Chance Body Armor, Inc.*, No. 2004-003268 (La. 14th Cir. Ct.); *LaBrosse v. Toyobo Co.*, No. 04-402021-CZ (Wayne Cty. Cir. Ct., Mich.); *Lemmings v. Second Chance Body Armor, Inc.*, No. CJ-2004-62 (Mayes Cty. Dist. Ct., Okla.); *Scannell v. Toyobo Co.*, No. CV 04-9288 GPS (Cal. Super. Ct.). In each instance, class-action plaintiffs' counsel named one non-diverse defendant to ensure that the cases could not be removed and transferred to a multi-district litigation panel. The net effect of class-action plaintiffs' collusive multi-state strategy was to force SCBA to incur millions of dollars in legal fees before finally declaring bankruptcy. *See In re Second Chance Body Armor, Inc.*, No. 04-12515 (Bankr. W.D. Mich.).

Congress expressly incorporated its finding that abuses of the class-action device, like those in the SCBA litigation, arose from manipulative pleading by plaintiffs to avoid federal diversity jurisdiction:

> (4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are –
>
> (A) keeping cases of national importance out of Federal court;
>
> (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
>
> (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.
>
> (b) PURPOSES. – The purposes of this Act are to –
>
> . . . .
>
> (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction

Pet. App. at 31a-32a.

The Third Circuit's imposition of an impossibly high evidentiary burden on removing defendants, in conjunction with deference to plaintiffs' non-binding ad damnum clauses in their state court complaints, combine to frustrate the purposes for which Congress enacted CAFA. The Third and Ninth Circuits' decisions reward state-court

forum-shopping by class-action plaintiffs' counsel who know that by pleading damages less than the jurisdictional amount, they can ensure that defendants are denied access to federal fora, at least until after important decisions are made regarding class certification, choice of law, and the like. And even if defendants can later remove, they are stuck with the decisions made in state courts because "[w]hen a case is removed the federal court takes it as though everything done in the state court had in fact been done in the federal court." *Munsey v. Testworth Labs.*, 227 F.2d 902, 903 (6th Cir. 1955); *Savell v. Southern Ry.*, 93 F.2d 377, 379 (5th Cir. 1937); *see also Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 436 (1974) ("After removal, the federal court 'takes the case up where the State court left it off.'" (quoting *Duncan v. Gegan*, 101 U.S. 810, 812 (1880)).

Likewise, the Third and Ninth Circuits' formulations of the burden on removing defendants make it more difficult, if not impossible, to aggregate and efficiently manage nationwide litigation. Not only is such piecemeal litigation inefficient, but it creates the type of situations where a plaintiff can engage in "judicial blackmail" to coerce defendants to settle even frivolous claims. These are the very schemes Congress hoped to prevent by implementing CAFA.

The deference given to plaintiffs' non-binding ad-damnum allegations under the Third and Ninth Circuits' formulation of the burden on removing defendants has a deleterious effect on removal under CAFA under 28 U.S.C. § 1332(d), and traditional removal under 28 U.S.C. § 1332(a). Under CAFA, a defendant is left with unpalatable options: It can wait until it has a smoking gun to

prove the amount in controversy to a legal certainty (and bear the risks of litigating class certification and other issues in state court or courts); it can remove with the risk of remand precluding access to federal court by means of the law-of-the-case doctrine; or it can remove on the assumption that if the case were remanded, the parties can play judicial ping-pong between state and federal courts until the amount in controversy is met or the plaintiffs enter into a binding stipulation limiting damages. Even if the state court were to apply judicial estoppel to limit the plaintiff's damages to less than the jurisdictional amount, the defendant remains unable to access federal court, and the policies underlying CAFA are negated.

But the defendant subject to traditional removal requirements under 28 U.S.C. § 1332(a) is subject to a worse predicament. Unlike CAFA removal, traditional removal must occur within 30 days of service of the complaint or other pleading conferring jurisdiction, but never more than one year after the suit is initiated. 28 U.S.C. § 1441(b). After one year passes, the plaintiff is free to modify his or her ad damnum or file pleadings demanding more than the jurisdictional amount without capping monetary damages or the risk of judicial estoppel.

The Third and Ninth Circuits' formulation of the burden on removing defendants gives rise to risks of jurisdictional manipulation and gamesmanship that will unfairly deprive defendants of their statutory right to litigate in federal court. For all these reasons, the Court should grant the petition and clarify the appropriate standards for removal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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